12-4-2009

# State v. Stewart Appellant's Reply Brief Dckt. 36116

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO, Plaintiff-Respondent, v. CLIFFORD STEWART, Defendant-Appellant. | ) | NO. 36116 REPLY BRIEF |



# REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

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## STATEMENT OF THE CASE

### Nature of the Case

In response to Mr. Stewart's claims regarding the district court's violation of his constitutional protection against being twice placed in jeopardy for the same underlying crime, the State has presented two main lines of argument. First, the State has argued that Mr. Stewart has not provided a sufficient record to determine whether the acts underlying Mr. Stewart's prior misdemeanor conviction for stalking were used to support the subsequent felony stalking charge at issue in this appeal. Second, the State relies primarily on the U.S. Supreme Court decision of *Garrett v. U.S.*[1] to assert that there was no double jeopardy violation in this case.

This Reply Brief is necessary to clarify that the State's contentions are erroneous on both points.

### Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Stewart's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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[1] *Garrett v. U.S.*, 471 U.S. 773 (1985).

## ISSUE

Did the district err when it denied Mr. Stewart's motion to dismiss the felony stalking charge?

## ARGUMENT

### The District Court Erred When It Denied Mr. Stewart's Motion To Dismiss The Felony Stalking Charge At Issue In This Case

#### A. Introduction

The record contained in the record in this case shows that the State sought to rely on the prior course of conduct for which Mr. Stewart had previously been sentenced, coupled with only one new act, in support of its charge of felony stalking. This evidence came, as it necessarily must, from the materials submitted by the State in support of this charge and the evidence was clearly a part of the district court's record.

While the State attempts to rely on the opinion in *Garrett v. U.S.*, subsequent case law from the United States Supreme Court reveals that this reliance is misplaced. Under a proper application of pertinent case law – and particularly in light of the persuasive precedent from other jurisdictions dealing with identical charges to the one at issue in this appeal – it is clear that Mr. Stewart's Fifth Amendment constitutional protection against being punished twice for the same offense was violated. As such, the district court erred when it denied Mr. Stewart's motion to dismiss the felony offense in this case.

#### B. The Record In This Case Clearly Demonstrates That The State Was Relying On The Prior Course Of Conduct Underlying Mr. Stewart's Previous Misdemeanor Stalking Conviction Along With A Single New Act

On appeal, the State has claimed that Mr. Stewart failed to provide evidence that demonstrates that the course of conduct underlying his prior conviction was used as the basis for the felony stalking charge at issue in this appeal. There are four reasons set

forth by the State in support of this contention. However, a review of each of these reasons reveals them to be unavailing.

First, the State has asserted that this Court cannot rely on the materials contained within the district court's own case file because defense counsel did not specifically request that the court consider its own records, which included the State's discovery response and supplements to the original discovery response. (Respondent's Brief, p.6.) In doing so, the State attempts to rely on a footnote contained in *State v. Mitchell*, 124 Idaho 374, 376 n.1, 859 P.2d 972, 974 (Ct. App. 1993).

The *Mitchell* court never held that materials contained in the district court's own record, and that have been specifically incorporated into the record on appeal, cannot be considered by an appellate tribunal. Nor could such an assertion be maintained. To the contrary, the evidence at issue in the pertinent portion of *Mitchell* was evidence that was never made a part of the record below. *Mitchell*, 124 Idaho at 376 n.1, 859 P.2d at 974. In fact, the State omitted from its quotation of this portion of the *Mitchell* Opinion the following sentence which demonstrates that the State's assertion lacks merit: "We are limited to review of the *record made below*." *Id.* (emphasis added.) (*See* Respondent's Brief, p.6.) The documentation regarding the acts that the State was seeking to rely on in support of the felony stalking charge in this case were indisputably made part of the record below – as evinced by the fact that each of these documents relied on by Mr. Stewart were part of the district court's own file in this case.

Second, the State has claimed that, because one of the State's discovery responses was labeled "supplemental," there was a potential for other evidence of other acts to have been presented by the State in support of the felony stalking charge. This

argument ignores what it is that the State's supplemental discovery response was intended to supplement. "Supplemental" means "serving to supplement," which – in turn – refers to the act of adding to something else. Merriam-Webster Online Dictionary (visited November 28, 2009) http://www.merriam-webster.com/dictionary/supplemental; http://www.merriam-webster.com/dictionary/supplement. Here, the supplemental discovery response merely provided information on the underlying charge that was additional to the information previously provided to Mr. Stewart and the district court regarding the basis for the charges in this case. And the key fact for this Court is that *all* of the information provided by the State as to the basis for Mr. Stewart's charges indicated that it was the prior course of conduct for which he had already been sentenced, plus one additional and isolated act, that formed the factual predicate for the felony stalking charge. (R., pp.57-59, 81-82, 88-90.) The assertion that the State potentially *could have* identified other information or acts in support of the charges in this case is nothing more than mere speculation, and this Court should not indulge in speculation that is unsupported by the record. *See, e.g., State v. Christensen*, 131 Idaho 143, 147, 953 P.2d 583, 587 (1998) (declining to speculate on factual matters not contained within the record).

The third claim raised by the State regarding the underlying factual basis of the stalking charge in this case is one that has been expressly disavowed in pertinent case law – that it was possible for the State to have segregated some of the acts from the prior course of conduct underlying Mr. Stewart's previous misdemeanor conviction so as to reserve those acts for use in support of a later conviction. (Respondent's Brief, p.7.) This suggestion has been expressly considered and rejected by the United States

Supreme Court in *Brown v. Ohio*, 432 U.S. 161, 169 (1977). (*See also* Appellant's Brief, pp.13-14.) In addition, case law from other jurisdictions that specifically address double jeopardy concerns with regard to stalking charges also reject such a post-hoc parsing out of acts from an otherwise continuous prior course of conduct in order to seek to re-charge a defendant based upon those acts. *See Eichelberger v. State*, 949 So.2d 358, 359-360 (Fla. Dist. Ct. App. 2007).

Finally, the State's fourth point of contention is merely a recitation that some of the materials submitted by the State referred to the sending of "emails" by Mr. Stewart to the alleged victim. (Respondent's Brief, p.7.) The use of a plural term is irrelevant, however, when the actual evidence that the State intended to rely on indicates that there was only one new act that occurred aside from the prior course of conduct. But, more important for this Court, the prosecutor who brought the charges in this case – and who was therefore presumably familiar with the basis for those charges – conceded that the State was seeking to charge Mr. Stewart for a single act coupled with the prior course of conduct for which he had already been sentenced at the first hearing on Mr. Stewart's motion to dismiss the State's charges.[2] (Tr., p.3; R., pp.54-55, 94-95.) The prosecutor conceded the following:

> *There is only the one act on the -- on this felony.* I mean, we're saying that if you -- that this means if you've been convicted of stalking and you do it again, it's a felony. And they're saying that when you do it again, you've got to do it at least a couple of times to get a course of conduct. *We're saying that the course of conduct can go back to the prior action.* So I think we do need a ruling on the statute itself as to what that means.

[2] While a different prosecutor presented argument at the second hearing on Mr. Stewart's motion to dismiss the State's stalking charge, this Court may wish to note that this prosecutor, by his own admission, was not familiar with the underlying basis of the charge. (Tr., p.37, Ls.1-2.)

(Tr., p.16, Ls.3-11.)

There is no meaningful dispute in this case that the State was seeking to rely on the prior course of conduct for which Mr. Stewart had previously been sentenced in order to establish a course of conduct as is required to support a conviction for felony stalking. The State's arguments to the contrary are erroneous.

C. Prosecuting Mr. Stewart A Second Time For The Course Of Conduct That Formed The Basis Of His Prior Stalking Conviction Violates The Fifth Amendment Prohibition Against Prosecuting A Defendant A Second Time For An Offense For Which The Defendant Has Already Been Sentenced

The State's primary argument as to why double jeopardy does not present a bar to Mr. Stewart's conviction in this case is made in reliance upon a single case: *Garrett v. U.S.*[3] (Respondent's Brief, pp.11-16.) However, the holding in *Garrett* is inapposite to the situation present in this case – where the prior course of conduct and the current course of conduct are substantially identical in form – and the U.S. Supreme Court has expressly clarified this fact in its subsequent opinion of *Ruteledge v. U.S.*, 517 U.S. 292 (1996).

[3] The State also focuses on the provision of the felony stalking statute that limits application of the statute to a person who "violates" the misdemeanor stalking statute in support of its assertion that the State may rely on a past course of conduct for which the defendant has been sentenced in order to establish a new stalking charge. (Respondent's Brief, p.10.) This statutory language actually demonstrates the opposite. The use of the present tense with regard to a violation of the misdemeanor stalking statute - that the defendant "violates" the terms of this statute – implies that the course of conduct regarding the acts of stalking be part of a present course of conduct. *See* I.C. § 18-7905. Had the legislature wished to permit a past course of conduct to suffice, the legislature could have easily promulgated the statute so as to read, "violates *or has violated,* section 18-7906, Idaho Code." *See U.S. v. Wilson*, 503 U.S. 329, 333 (1992) (legislature's use of either past or present verb tense "is significant in construing statutes"); *Malik v. McGinnis*, 293 F.3d 559, 562-563 (2nd Cir. 2002) (interpreting use of present tense in statute as meaning that the condition must exist at the time the complaint is filed).

The charges at issue in the double jeopardy analysis in *Garrett* were an alleged violation of the federal continuing criminal enterprise statute, which is essentially a prohibition against conspiracy to commit drug offenses, and a charge regarding one of the drug offenses that formed a portion of the criminal drug enterprise or conspiracy. *Garrett*, 471 U.S. at 775-776. While *Garrett* found that there was no double jeopardy violation in bringing both charges, this holding is merely an elaboration of the long-standing rule that it does not violate double jeopardy to charge a defendant both with conspiracy to commit an offense and the completed offense itself. *See, e.g., Iannelli v. U.S.*, 420 U.S. 770-777-778 (1975). A different result obtains, however, when the two charged offenses are based upon the same basic type of underlying offense.

Ten years after the U.S. Supreme Court decided *Garrett*, the Court turned to the issue of whether double jeopardy would bar a prosecution for both conspiracy to distribute controlled substances and for continuing criminal enterprise. *See Ruteledge*, 517 U.S. at 294. It is also worth noting that the Court in *Ruteledge* applied the *Blockburger* test in reaching its determination that the multiple charges in that case violated the constitutional prohibition against double jeopardy. *Id.* at 297-298. The *Ruteledge* Court further noted that, "For over half a century we have determined whether a defendant has been punished twice for the same offense by applying the rule set forth in *Blockburger v. United States.*"[4] *Id.* at 297 (internal citation omitted.)

[4] To the extent that the State argues in this appeal that the *Blockburger* test is not the appropriate test for determining whether two offenses are the same for double jeopardy purposes, this assertion appears to be disavowed by the *Ruteledge* opinion, and by the numerous decisions from the U.S. Supreme Court and Idaho appellate courts that consistently apply the *Blockburger* test. (*See* Respondent's Brief, pp.14-15; Appellant's Brief, pp.16-17.)

This time, based upon the similarity of the *actus reus* of the charges themselves, and the overlap of the underlying acts charged, the Court found that prosecutions for both offenses would violate double jeopardy. *Id.* at 297-300. In so doing, the Court clarified why the *Garrett* opinion was not contrary to this conclusion. *Id.* at 300 n.12. The *Ruteledge* Court stated:

> [The *Garrett*] holding, however, merely adhered to our understanding that legislatures have traditionally perceived a qualitative difference between conspiracy-like crimes and the substantive offenses on which they are predicated. No such difference is present here. In contrast to the crimes involved in *Garrett*, this case involves *two* conspiracy-like offenses directed at largely identical conduct.

*Id.* (internal citations omitted).

The same can be said in this case – both Mr. Stewart's prior charge and sentence for misdemeanor stalking and his current charge of felony stalking deal with charges of an identical type and are offenses that are directed at largely identical conduct. Indeed, under Idaho's statutory scheme, the commission of felony stalking is nothing more than the commission of misdemeanor stalking with one or more aggravating circumstances present. I.C. § 18-7905(1). Based upon the U.S. Supreme Court's own interpretation of the scope and purview of *Garrett*, the *Garrett* opinion simply does not apply in the context of this case.

Moreover, the decision in *Garrett* was largely predicated on the presence of express, unambiguous, and unequivocal language from the legislative history (including excerpts from the actual debates on the House and Senate floor regarding this legislation) that made it "indisputable" that Congress intended to create separate and independent offenses with regard to continuing criminal enterprise and the underlying offenses committed in the course of the conspiracy involved in the drug enterprise.

*Garrett*, 471 U.S. at 779-784. We have no such clear directive from the legislature in this case.

While the State has attached various documents regarding the legislative history of I.C. § 18-7905, the State makes no specific argument as to *how* this history shows indisputably that the legislature did not intend to require a separate course of conduct in support of a subsequent charge of stalking. (Respondent's Brief, p.11 n.3.) Instead, the State rests on a conclusory statement, contained in a footnote, that the legislative history supports its position. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (party waives an issue on appeal if either argument or authority is lacking).

A review of the legislative history appended, but not analyzed, by the State shows that there is no such intent expressed at any point. The discussion regarding I.C. § 18-7905 focuses exclusively on the desirability of creating two different degrees of punishments for different types of stalking offenses – this discussion in no way subsumes any statement of purpose regarding the permissibility of successive prosecutions for the same course of conduct. (Respondent's Brief, Appendices A, B, C, D.)

The State's assertion is also in contravention of the plain language of I.C. § 18-7905 itself. The felony stalking statute unequivocally states that "course of conduct" for a new count of felony stalking is defined in the same manner as that term is defined for a misdemeanor offense. I.C. § 18-7905(2). Had the legislature intended to require merely one new contact or act, coupled with a prior course of conduct, the legislature could have easily decided to adopt a different definition for the phrase "course of conduct" that would expressly embrace acts for which the defendant had previously

been sentenced. In the alternative, the legislature could have simply defined felony stalking as the prior commission of a stalking offense against the same victim coupled with the aggravating factors enumerated in the statute. The legislature determined not to do so.

The State's reliance on *Garrett v. U.S.* is unavailing based upon the nature of the charges in this case and the lack of any discernible evidence from the legislative history for I.C. § 18-7905 in support of the State's position. Under a proper application of double jeopardy principles, Mr. Stewart was unconstitutionally subjected to a successive prosecution for conduct for which he had already been sentenced. As such, the district court abused its discretion when it denied Mr. Stewart's motion to dismiss the felony stalking charge in this case.

## CONCLUSION

Mr. Stewart respectfully requests that this Court reverse the district court's order denying his motion to dismiss his first degree stalking charge, and remand this case for further proceedings.

DATED this 4th day of December, 2009.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of December, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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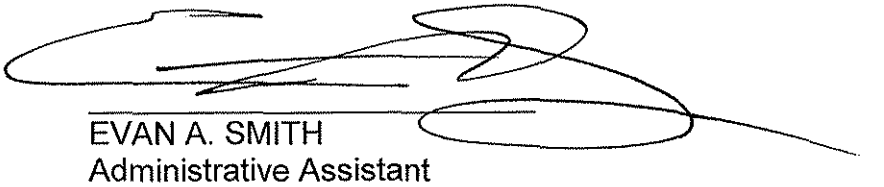

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